Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

HERITAGE BANK, f/k/a BRAZOS BANK NA,

Petitioner,

v.

REDCOM LABORATORIES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE POWERS RESERVED BY THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROHIBIT THE FEDERAL DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FROM VOIDING THE EFFECT OF A TEXAS STATE DISTRICT COURT'S TEMPORARY INJUNCTION.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. THE DECISION BELOW USURPS THE EFFECT OF A STATE DISTRICT COURT'S INJUNCTIVE ORDER 6

II. THE FEDERAL JUDICIARY SHOULD HAVE THE RESTRAINT OF HONORING THE PLAIN MEANING OF A STATE DISTRICT COURT'S ORDER THAT COULD HAVE BEEN APPEALED IN THE STATE JUDICIAL SYSTEM, BUT WAS NOT APPEALED 6

CONCLUSION 13

APPENDIX

FIFTH CIRCUIT COURT OPINION 1a

FEDERAL DISTRICT COURT JUDGMENT 18a

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS 20a

FIFTH CIRCUIT ORDER DENYING REHEARING 38a

U.S. CONST. AMEND. X 1b

TABLE OF CONTENTS – Continued

Page

TEXAS CIVIL PRACTICES & REMEDIES CODE § 51.014 ..... 1b

TEXAS GOVERNMENT CODE § 22.003 ..... 2b

TEXAS GOVERNMENT CODE § 22.004 ..... 2b

TEXAS GOVERNMENT CODE § 22.225(b)(5) 4b

RULE 26.1(b), TEXAS RULES OF APPELLATE PROCEDURE 5b

RULE 28.1 TEXAS RULES OF APPELLATE PROCEDURE 5b

TABLE OF AUTHORITIES

Page

CASES:

Fairfield v. Stonehenge Assn. Co., 678 S.W.2d 608 (Tex.App. – Houston [14th Dist.] 1984, no writ) 7

Harrison v. Manvel Oil Co., 180 S.W. 2d 909 (Tex. 1944) 9

Staten Island Loaders v. Waterfront Commission of New York Harbor, 117 F. Supp. 308 (D.C.N.Y. 1953) aff'd 347 U.S. 439 10

Stoner v. Massey, 586 S.W. 2d 843 (Tex. 1979) 9

United States v. Lopez, 514 U.S. 549 (1995) 10

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The District Court's Judgment (per Buckmeyer, D.J.) granting Respondent's Summary Judgment Motion and denying Petitioner's Summary Judgment Motion (Pet. App. 11a) is not published. The Court of Appeals' Opinion (per Smith, C.J., joined by Reaveley and DeMoss) affirming (Pet. App. 1a-10a.) is published at 250 F.3d 319. The Court of Appeal's Order denying rehearing (Pet. App. 12a.) is not published.

BASIS FOR JURISDICTION

The Court of Appeals entered its Opinion and Order on May 14, 2001, and denied rehearing on June 13, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution, Amendment X are reprinted in the Pet. App. 1b.

The provisions of the Texas State Law, Tex. Govt. Code §§ 22.003, 22.004, 22.225(b)(5) and § 51.014(5) Tex. Civ. Prac. & Rem. Code, relevant to this petition are reprinted in the Pet. App. 1b, 2b, 3b, 4b.

STATEMENT OF THE CASE

This case involved a dispute between Heritage, the issuing bank on the Letter of Credit, and Redcom, the beneficiary of the Letter of Credit, concerning whether or not Heritage had any liability to Redcom for dishonoring a presentment made on November 20, 1998, a time when Heritage had been enjoined from honoring the Letter of Credit by the 249th Judicial District Court of Johnson County, Texas (the "Johnson County District Court") in a separate, discrete lawsuit brought by Fiber Wave, the account party to the Letter of Credit.

After the Letter of Credit expired on February 3, 1999, Fiber Wave dismissed Heritage from its lawsuit before the Johnson County District Court. Redcom made a demand in March of 1999 upon Heritage to honor the presentment Redcom previously made on November 20, 1998 while Heritage was under restraint of the Temporary Injunction issued by the State Court in Cause # 95-98. In response to the demand of Redcom, on March 10, 1999, Heritage filed this lawsuit against Redcom and Fiber Wave in the Johnson County District Court, Cause # C19990071, seeking declaratory relief concerning its potential liability to both Redcom and Fiber Wave under the Letter of Credit. (R1:10-14.) In connection with answering the lawsuit and asserting its counterclaim for

wrongful dishonor Redcom filed a Notice of Removal to federal court, asserting that Fiber Wave had been fraudulently joined to defeat diversity of citizenship jurisdiction. (R2:1-6.) After Heritage filed a Motion for Remand and challenged federal court jurisdiction, the federal Trial Court denied Heritage's Motion for Remand in an Order dated June 29, 2000. (R1:115.).

On November 10, 1999, Heritage's Motion for Summary Judgment seeking disposition of both its own claims and Redcom's counterclaim was filed by joint submission along with all related evidence and briefs. (R1:185-286.) Thereafter, on November 22, 1999, Redcom's Motion for Summary Judgment which also sought disposition of both its own counterclaim and Heritage's claims was filed by joint submission along with all related evidence and briefs. (R2:293-470.) On March 22, 2000, in response to Heritage's Motion to Vacate Trial Setting For Resolution of Pending Motions for Summary Judgment, the Trial Court vacated its scheduling order and the trial date pending resolution of the motions for summary judgment. (R2:546.)

On May 17, 2000, Magistrate Judge Stickney signed his Findings, Conclusions and Recommendations of the United States Magistrate Judge, denying Heritage's Motion for Summary Judgment and granting Redcom's Motion for Summary Judgment. (R2:547-562.; App. Pet. App. 13a. – 27a.) On May 26, 2000, Heritage filed its Objections to the Findings, Conclusions and Recommendations of the Magistrate Judge. (R2:563-572.) On June 28, 2000, the Trial Court adopted the findings and conclusions of the Magistrate Judge and entered Judgment denying Heritage's Motion for Summary Judgment and

granting Redcom's Motion for Summary Judgment. (R2:573, Pet. App. 18a.) On July 27, 2000, Heritage filed its Notice of Appeal from the June 28, 2000 Judgment. (R2:575.). On May 14, 2001, the Court of Appeals rendered an opinion. 250 F.3d 319 (Pet. App. 1a-17a.) On June 13, 2001 the Court of Appeals denied the Petitioner's petition for rehearing. (Pet. App. 38a.).

Because the current litigation is a case arising out of the same Letter of Credit as is the subject matter in a discrete state court pending lawsuit, Cause No. 249-95-98, *Fiber Wave Telecom, Inc. v. Redcom, Inc.*, a review of the relevant facts in that lawsuit is also necessary. On February 3, 1998, Heritage issued Commercial Letter of Credit No. 9518 (the "Letter of Credit"). (Findings, p. 1; Pet. App. 21a.) (R2:547.) The Letter of Credit expired on February 3, 1999 according to its express terms. (Findings, p. 2; Pet. App. 21a.) (R2:548.) Equipment was shipped by Redcom on March 27, 1998 to Fiber Wave. (Findings, p.2; Pet. App. 21a.) (R2:548.) Redcom made a presentment received by Heritage on May 1, 1998. (Findings, p.2; Pet. App. 21a.) (R2:548.)

On May 5, 1998, prior to a final determination by Heritage on whether Redcom's presentment complied with the Letter of Credit, Fiber Wave Telecom, Inc. ("Fiber Wave"), the applicant or account party, filed a lawsuit in the 249th Judicial District Court of Johnson County, Texas, Cause # 95-98 (the "Johnson County District Court") and obtained a temporary restraining order to enjoin Heritage from honoring Redcom's presentment. (Findings, p.2; Pet. App. 14a.) (R2:548.) Subsequently, on June 5, 1998, the Johnson County District Court of general jurisdiction entered an Order granting a temporary

injunction ("Temporary Injunction") that enjoined Heritage *from honoring the Letter of Credit*. (Emphases added) (Findings, p.2; Pet. App. 14a.) (R2:548.) Redcom did not appeal the Temporary Injunction.

With the Temporary Injunction in effect, Redcom attempted to make another presentment to Heritage for payment under the Letter of Credit on November 20, 1998. (Findings, p.2; Pet. App. 14a.) (R2:548.) On November 25, 1998, Heritage, through its counsel, expressly informed Redcom that its November 20, 1998 presentment was being dishonored due to the pending Temporary Injunction. (Findings, p.2; Pet. App. 14a.) (R:548.) On January 27, 1999, Redcom filed a counterclaim in the Johnson County District Court lawsuit seeking to enjoin the expiration of the Letter of Credit, and a Motion to Dissolve Temporary Injunction. (R1:275, 271.) On February 9, 1999, the Johnson County District Court signed orders denying both Redcom's Application and Motion. (R1:282, 283.)

As previously noted, the Letter of Credit expired on February 3, 1999. (Findings, p.3; Pet. App. 13a.) (R2:549.) On February 4, 1999, Fiber Wave non-suited Heritage, causing the Temporary Injunction to expire. (Findings, p.3; Pet. App. 15a.) (R2:549.) Subsequently, on March 8, 1999, Heritage received a demand letter from Redcom for payment of the presentment previously made on November 20, 1998. (R1:264.)

REASON FOR GRANTING THE WRIT

I. THE DECISION BELOW USURPS THE EFFECT OF A STATE DISTRICT COURT'S INJUNCTIVE ORDER.

II. THE FEDERAL JUDICIARY SHOULD HAVE THE RESTRAINT OF HONORING THE PLAIN MEANING OF A STATE DISTRICT COURT'S ORDER THAT COULD HAVE BEEN APPEALED IN THE STATE JUDICIAL SYSTEM, BUT WAS NOT APPEALED.

The Tenth Amendment to the Constitution of the United States (Pet. App. 1b.) reserves certain powers to the states and thereby limits the powers of the federal government to those granted in the Constitution itself. In the instant case, the Federal District Court for the Northern District of Texas and the Fifth Circuit Court of Appeals have collaterally attacked a temporary injunction granted by a state district court in a pending lawsuit and rendered the temporary injunction impotent.

Both lower courts determined that the instant litigation was a separate, discrete cause of action from the state court action in which the temporary injunction proceeding was held. Based on a statement by a lawyer for one of the parties in the separate state court suit the federal court voided the effect of the temporary injunction. This is a collateral attack on the temporary injunction. A matter which was addressed below by the Petitioner in both federal courts.

If the lawyer had made the statement in the separate state court proceeding (Cause # 95-98) that he was asking the state court to enjoin the bank from honoring proper

presentments and the state court had ruled that such proper presentments could be dishonored, could the beneficiary (Redcom) of the letter of credit question the validity of the trial court appealable injunction order by showing that a proper presentment was dishonored based on the statement of the lawyer for the letter of credit applicant? That is an issue which is properly addressed pursuant to state court rules of procedure permitting interlocutory appeals of grants of temporary injunctions.

The factual findings of this case are not in dispute. The ruling of the Federal District Court doesn't misapply a rule of law. There isn't a rule of law, federal or state, where the federal judiciary is empowered to void a state court appealable order based on a statement of a lawyer in a discrete, separate state court proceeding, particularly where the language in the appealable injunctive Order is clear. The Fifth Circuit Court of Appeals opinion, *Redcom*, at page 327, cites as authority for voiding the State of Texas District Court's Injunction the state appellate decision of *Fairfield v. Stonehenge Assn. Co.*, 678 S.W.2d 608 (Tex.App. – Houston [14th Dist.] 1984, no writ). This is a Texas Appellate Court holding that the District Court below did not have jurisdiction to enjoin the appellee from doing an act that the appellant didn't request be prohibited. The obvious needs to be pointed out – the *Fairfield* case isn't a federal district court deciding what the state court has jurisdiction to do or not to do, it is the 14th District Court of Appeals at Houston, Texas, the direct appellate court for the 151st District Court, Harris County, Texas, the *Fairfield* trial court. If the federal judiciary is the arbiter of the jurisdiction *vel non* of a state

trial court of general jurisdiction, then there is no need for state appellate courts or state rules of appellate procedure.

The writ should be granted because the federal judiciary should not interfere with the orderly process of State of Texas judicial proceedings. Redcom had available to it an appeal of the interlocutory Order of June 5, 1998. The question faced by this Court is not whether the State District Trial Court in Cause Number 95-98 granted a Temporary Injunction for relief not requested. The question is whether the Federal District Court for the Northern District of Texas in a separate and discrete lawsuit can declare the State of Texas District Court Order void ab initio because the 249th District Court of Johnson County, Texas didn't have jurisdiction to enter a temporary injunction by an interpretation that ignores the plain language of the Order.

The Order of June 5, 1998 is clear. The Fifth Circuit recognized that clarity in its opinion, "[T]he parties dispute the scope of the temporary injunction, which states that it 'is granted as requested . . . and enjoining defendant . . . from honoring the letter of credit.' This language seems plainly to mean that the bank cannot honor presentment for a draw on the letter of credit." *Redcom*, at page 328. The Fifth Circuit Opinions recognizes Heritage's right to dishonor the November 20, 1999 presentment if the Temporary Injunction Order was valid – "[t]he bank may still prevail, however, if the injunction prevented it from honoring *any* (emphasis 5th Circuit) presentment." *Redcom*, at page 327.

In Texas "[t]he controlling intention of the court's judgment is that expressed on the face of the judgment and not an intention that may be deduced from evidence that the court had before it. *Blackwell v. Coleman County*, 94 Tex. 216, 220, 59 S.W. 530." *Harrison v. Manvel Oil Co.*, 180 S.W. 2d 909 915 (Tex. 1944). The 10th District Court of Appeals at Waco, Texas could have reviewed the June 5, 1998 Order, if Redcom had timely appealed. No appeal was taken.

The Legislature of the State of Texas has provided for an appeal process of certain interlocutory orders. A temporary injunction is such an appealable order. TEX. CIV. PRAC. & REM. CODE § 51.014(4). (Supp. App. 2.) Additionally, pursuant to its rule making authority granted in Texas Government Code §§ 22.003, 22.004, (Pet. App. 2b, 3b, 4b) the Texas Supreme Court has promulgated Rule 28.1, Texas Rules of Appellate Procedure, (Pet. App. 5b) which provides for an accelerated appellate process for interlocutory orders. As an alternate remedy, the Texas Supreme Court has determined that "[T]he failure of a court to observe a mandatory statutory provision conferring a right or forbidding particular action will render its order or judgment invalid and this Court has the power through an exercise of its original jurisdiction to order a trial court to vacate and expunge an invalid order." *Stoner v. Massey*, 586 S.W. 2d 843 (Tex. 1979).

Neither the Texas Rules of Appellate Procedure nor Texas Civil Practices and Remedies Code § 51.014(5) nor the *Stoner* case have been declared unconstitutional by any federal court. Whether Texas has chosen the best remedy for correcting an improper interlocutory tempor ary injunction order is not for the federal judiciary to

decide. *Staten Island Loaders v. Waterfront Commission of New York Harbor,* 117 F. Supp. 308 (D.C.N.Y. 1953) affirmed 347 U.S. 439.

The Supreme Court of the United States commenced in 1995 a move to restrain Congress from unlimited federal authority. *United States v. Lopez,* 514 U.S.549 (1995). Who restrains the federal judiciary from imposing its will on state judiciaries? The Constitution?

The State of Texas has provided for a higher court review of a state district court's granting or denying of injunctions. (§ 51.014 Tex. Civ. Prac. & Rem. Code.) If the 10th District Court of Appeals at Waco, Texas, had upheld the plain meaning of the Order of the 249th District Court, then Redcom could have asked for review in the federal system or asked the Supreme Court of the State of Texas for a writ of mandamus. It is submitted that if Redcom had appealed the Order granting the Temporary Injunction to the 10th District Court of Appeals at Waco, Texas that Court would more than likely have reversed and rendered enjoining only improper presentations of the Letter of Credit. The State of Texas appellate jurisdiction was not invoked by Redcom; therefore, the Order of June 5, 1998, in Cause # 95-98, became non-appealable twenty (20) days after June 5, 1998. Tex. Rules of App. Proc. 26.1(b) (Pet. App. 1g.) It is true that it could have been modified or dissolved by the Trial Court in Cause # 95-98. Courts of Civil Appeals are the final arbiter of trial court temporary injunctions in Texas. § 22.225(b)(5) Tex. Govt. Code (Pet. App. 1f.) There isn't any constitutional or federal statutory authority allowing an interruption or suspension of these state procedural laws by a federal court.

The Tenth Amendment to the United States Constitution reserves to the states powers not delegated to the federal government, or to the people. The Constitution does not have any provision, article, section, or amendment, that empowers the federal judiciary to decide whether or not a state district court has the jurisdiction to issue temporary injunctions enjoining a bank from honoring or dishonoring proper or improper submissions for payment of a letter of credit. The Federal Courts should restrain from interfering with the State of Texas 249th District Court injunctive Order in the case of *Fiber Wave v. Brazos Bank NA, now Heritage Bank, and Redcom Laboratories, Inc.*, Cause # 95-98, 249th District Court, Johnson County, Texas. Otherwise, no appealable state court temporary injunction order is certain. Section 22.225(b)(5) Tex. Govt. Code states that an appeal from an order granting or refusing a temporary injunction is conclusive on the law and the facts. Redcom had the opportunity to appeal the grant of the temporary injunction in State Court Cause # 95-98, 249th District Court to the 10th District Court of Appeals at Waco, Texas and failed to take such an appeal. Redcom had the opportunity to appeal the denial of its request for temporary injunction to extend the term of the Letter of Credit in State Cause #95-98, 249th District Court to the 10th District Court of Appeals at Waco, Texas and again failed to take such an appeal.

The Notice of Removal in this case, Cause # C19990071, 249th District Court (the "Declaratory Judgment Action") was filed April 12, 1999. That case is a distinct, discrete and separate cause of action according to the Fifth Circuit opinion from Cause #95-98. The Fifth

Circuit further opined that the account party, Fiber Wave, has no present interest in this litigation. That being true, the federal judiciary has no authority to void the effect of a temporary injunction entered by the Johnson County District Court in a pending separate cause of action between the account party, Fiber Wave, and the beneficiary, Redcom, to the same letter of credit. However, that is precisely what the Federal District Court for the Northern District of Texas and the Fifth Circuit have done in this instance. The net effect is a collateral attack on a then existing temporary injunction entered in that separate lawsuit. There is no power granted by the United States Constitution which permits such an intrusion into matters pending before a state district court by the federal judiciary.

The lower Federal Courts have collaterally attacked the temporary injunction entered by the Johnson County District Court. The net result is an interference with a state court order and the State of Texas appellate process. Redcom had the opportunity to appeal the temporary injunction and chose not to avail itself of that remedy. The United States Constitution does not grant authority to the federal judiciary to interfere with a state court order. In fact, the 10th Amendment prohibits such an act.

CONCLUSION

For the reasons stated above, a writ of certiorari should be issued to review the decision of the United States Court of Appeals for the Fifth Circuit and, ultimately, to vacate and reverse the order below and remand the matter to the District Court for trial.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals,
Fifth Circuit.

HERITAGE BANK, Formerly Known as
Brazos Bank, N.A.,
Plaintiff-Counter Defendant-Appellant,
v.
REDCOM LABORATORIES, INC., et al.,
Defendants,
Redcom Laboratories, Inc.,
Defendant-Counter Claimant-Appellee.

No. 00-10835.

May 14, 2001

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Diane Kay Lettelleir (argued), W. Mike Baggett, Winstead, Sechrest & Minick, Dallas, TX, for Defendant-Counter Claimant-Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before REAVLEY, SMITH and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Heritage Bank issued a letter of credit to Fiber Wave Telecom, Inc. ("Fiber Wave"), which used it to purchase electronics from Redcom Laboratories, Inc. ("Redcom"), which delivered the goods and made presentment to the bank for payment. Fiber Wave believed the goods defective and successfully petitioned a Texas court to enjoin

the bank from honoring Redcom's presentment.[1] Redcom made another demand on the bank during the pendency of the injunction, but the bank refused to honor the presentment and sought a declaratory judgment exonerating it from liability.

Redcom sued the bank for wrongful dishonor, and the district court granted summary judgment for Redcom. The bank appeals, arguing that the court erred in exercising diversity jurisdiction and in granting summary judgment. Finding no reversible error, we affirm.

I.

On February 3, 1998, the bank issued Irrevocable Commercial Letter of Credit No. 9518 for $215,729 to Fiber Wave, naming Redcom as the beneficiary. The letter of credit was subject to the Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC Publication No. 500 ("UCP"), and was good for one year. It had no special conditions or unusual provisions. Redcom shipped goods to Fiber Wave on March 27, 1998, and made a presentment on April 24, 1998, which the bank received on May 1.

Before the bank determined whether the presentment complied with the letter of credit, Fiber Wave sued the bank and Redcom in state court and obtained a temporary restraining order ("TRO") that enjoined the bank from honoring the presentment. On May 6, the bank,

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[1] Fiber Wave and Redcom have sought to resolve their differences over the goods through a separate lawsuit in state court.

because of the TRO, dishonored the presentment. On June 5, the state court converted the TRO into a temporary injunction.

On November 20, while the injunction was in effect, Redcom made another presentment to the bank for payment under the letter of credit. On November 25, the bank again dishonored the presentment, citing the injunction. On January 27, 1999, Redcom filed a motion to dissolve the injunction and a motion to enjoin the expiration of the letter of credit. The court granted nonsuit to Fiber Wave and denied Redcom's motions.

The letter of credit expired on February 3, and on March 3, Redcom made another demand to the bank for payment, alleging that the injunction had been dissolved when Fiber Wave non-suited its claims against the bank. The bank filed a declaratory judgment action against Fiber Wave and Redcom in state court, and Redcom removed the action to federal court.

Redcom claimed that the bank had fraudulently joined Fiber Wave to destroy diversity jurisdiction, and the bank moved to remand, arguing that Fiber Wave was properly joined. The district court determined that Fiber Wave was improperly joined, and both parties moved for summary judgment. The district court granted summary judgment for Redcom, concluding, *inter alia*, that (1) the bank waived discrepancies in the November 20 presentment; (2) any presentments made after the expiration of the letter of credit would be ineffective;[2] and (3) the bank wrongfully dishonored the November 20 presentment,

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[2] Neither party challenges this finding on appeal.

because the injunction only prohibited the bank from honoring improper presentments.

II.

Redcom removed this action to federal court on the basis of diversity of citizenship. Removal is proper only if that court would have had original jurisdiction over the claim. *See* 28 U.S.C. § 1441(a), (b). The bank and Fiber Wave are citizens of Texas; Redcom is a citizen of New York. For diversity jurisdiction, the parties must be citizens of different states, and the amount in controversy must exceed $75,000. *See* 28 U.S.C. § 1332(a)(1). The amount in controversy is $195,729, and Redcom and the bank are diverse.

Joining Fiber Wave as a defendant, however, destroys diversity.[3] If Fiber Wave was properly joined as a party, diversity jurisdiction is destroyed, because the bank and Fiber Wave are not diverse. But if Fiber Wave was fraudulently joined, as Redcom asserts, then the case was properly in federal court.

We review *de novo* the denial of a motion to remand. *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 680 (5th Cir.2001). To establish that Fiber Wave was joined fraudulently to defeat diversity, Redcom must demonstrate either fraud in the recitation of jurisdictional facts or the absence of any possibility that the bank has stated a claim against

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[3] *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806) (finding that a controversy is between "citizens of different states" within the meaning of the statute only if no plaintiff is a citizen of the same state as any defendant).

Fiber Wave. *Rodriguez v. Sabatino*, 120 F.3d 589, 591 (5th Cir.1997). Redcom has not alleged fraud.

The bank contends that it sued under the Uniform Declaratory Judgments Act, which states that "[w]hen declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties." Tex. Civ. Prac. & Rem.Code § 37.006. Thus, claims the bank, because Fiber Wave will be liable to the bank for reimbursement if the bank has to honor Redcom's presentment under the letter of credit, Fiber Wave has an interest that would be affected by the declaration.[4]

Redcom correctly notes that the declaratory judgment cannot itself trigger Fiber Wave's reimbursement obligation, which, instead, is imposed only when the bank honors a presentment under the letter of credit. The declaratory judgment cannot order the bank to pay Redcom anything; it merely resolves questions regarding the rights of the parties. *See In re City of Dallas*, 977 S.W.2d 798, 804 (Tex.App. – Fort Worth 1998, no writ). Indeed, Texas law prohibits a court from ordering a bank to honor an [sic] letter of credit in the context of a declaratory

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[4] Tex. Bus. & Com.Code § 5.114(c) (Vernon 1998) governs Fiber Wave's liability:

> Unless otherwise agreed an issuer which has duly honored a draft or demand for payment is entitled to immediate reimbursement of any payment made under the credit and to be put in effectively available funds not later than the day before maturity of any acceptance made under the credit.

judgment. *See* Tex. Civ. Prac. & Rem.Code § 37.003(a) (Vernon 1997).

Texas law further requires that "a justiciable controversy must exist before a party can be properly joined" in a declaratory judgment action. *Sub-Surface Const. Co. v. Bryant-Curington, Inc.*, 533 S.W.2d 452, 456 (Tex.Civ.App. – Austin 1976, writ ref'd n.r.e.). If the resolution of a controversy "depends upon contingent or hypothetical facts, or upon events that have not yet come to pass," it is not ripe for review. *Patterson v. Planned Parenthood*, 971 S.W.2d 439, 443 (Tex.1998).

The bank's claim against Fiber Wave for reimbursement is contingent on a finding that it improperly dishonored Redcom's presentments. Thus, even though Fiber Wave has an interest in the *outcome*, it has no interest in the current *controversy*. Because the claim against Fiber Wave is not presently justiciable, the district court properly determined that the bank could establish no claim against Fiber Wave.

In addition, the rationale underlying letters of credit weighs in favor of finding that Fiber Wave was improperly joined. Commercial parties use letters of credit for the purpose of reducing the risk of dealing with unknown entities. A letter of credit permits a seller to transact with a known credit source (such as a bank) rather than with an unknown buyer. *E. Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 601 (5th Cir.1979). This type of arrangement creates three distinct relationships: (1) the transaction between buyer and seller; (2) the buyer's (applicant's) agreement to reimburse the bank for extension of credit; and (3) the letter of

credit, representing the bank's promise to pay the seller (the beneficiary) when it presents certain documents. *Id.*

The entire arrangement exists to allow the credit issuer's obligation to the beneficiary to operate independently of its underlying agreement with the applicant. *Id.* at 602.[5] Therefore, although the declaration of the rights of the bank and Redcom under the letter of credit ultimately may affect Fiber Wave, it has no legal interest in the current dispute. The district court did not err in finding fraudulent joinder and asserting diversity jurisdiction over the declaratory judgment claim.

III.

The bank contends that the court erred in granting summary judgment for Redcom on the wrongful dishonor claim. The bank argues that (1) Redcom made an untimely, deficient presentment; and (2) even if it were proper, the injunction prevented the bank from honoring it. Redcom contends that (1) the bank waived its right to raise discrepancies; and (2) the injunction prohibited only improper presentments. To prevail on a wrongful dishonor claim, Redcom must demonstrate (1) the issuance of a letter of credit; (2) timely presentation of the required documents; and (3) a failure to pay on the letter of credit. *Voest-Alpine Trading USA Corp. v. Bank of China,* 142 F.3d 887, 892 (5th Cir.1998).

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[5] Indeed, the bank's complaint asks the court to declare that it "has no liability to Redcom or Fiberwave [*sic*] under the letter of credit." Fiber Wave is not a beneficiary of the letter of credit, so the bank has no liability to it as the issuer.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). We review a grant of summary judgment *de novo*, applying the same standards as did the district court. *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1119 (5th Cir.1998).

A.

The bank and Redcom dispute whether the bank waived its right to raise discrepancies in the November 20 presentment. The parties agree that the April 24 presentment was improper, and Redcom has not appealed the decision that the bank did not have to honor it. The November 20 presentment, however, was an attempt to correct deficiencies in the earlier one. We must determine whether Redcom made a proper presentment under the terms of the letter of credit and, if not, whether the bank waived its right to object.

1.

We first must examine whether Redcom complied with the terms of the letter of credit. An issuer's liability on a letter of credit is contingent on proper presentment. *See Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378, 381 (Tex.1985). The question of proper presentment encompasses whether (1) Redcom provided appropriate documentation; (2) Redcom delivered its documents in a timely fashion; and (3) the bank had an

obligation to notify Redcom of the deficiencies even in the presence of the injunction.

Redcom presented various documentation to the bank as required by the letter of credit, including an invoice, sworn statements as to the delivery of the goods, and Federal Express receipts signed by Fiber Wave. At issue is whether Redcom complied with the letter of credit's requirement that Redcom present "one copy of the invoice/bill of lading upon receipt of each shipment as well as notification from Fiber Wave Telecom, Inc. stating that such equipment has been or is in the process of being delivered." Redcom claims that its submission of an invoice, affidavits stating that the goods were delivered, and signed Federal Express receipts meets this requirement; the bank argues that Redcom needed to submit a bill of lading.

Article 21 of the Uniform Customs and Practice for Documentary Credits ("UCP 500") requires that the letter of credit stipulate what types of documents will be accepted:

> When documents other than transport documents, insurance documents and commercial invoices are called for, the Credit should stipulate by whom such documents are to be issued and their wording or data content. If the Credit does not so stipulate, banks will accept such documents as presented, provided that their data content is not inconsistent with any other stipulated document presented.

Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC Pub. No. 500. Thus, if the letter of credit does not have specific requirements, the

bank should accept anything not inconsistent with other documents presented.

The bank argues that a bill of lading is a specific form of document that Redcom failed to provide. The plain language of the letter of credit drafted by the bank indicates otherwise. The letter of credit requires an "invoice/ bill of lading." The virgule separating the two terms signifies that Redcom may provide either an invoice or a bill of lading.[6] Redcom provided an invoice; under the terms of the letter of credit, it has complied.

2.

The bank claims that Redcom did not present its documents within twenty-one days after the date of shipment as required by article 43(a) of the UCP 500. The goods were shipped to Fiber Wave on March 27, 1998. Redcom made a deficient presentment on April 24, twenty-eight days after the date of shipping, and a corrected presentment on November 20, which was 200 days after the shipment. If the twenty-one-day provision applies, Redcom's presentment seems both deficient and untimely.

Apparently for the first time on appeal, Redcom contends that it first made a defective presentment on April 5, 1998, well within the twenty-one-day period, and that subsequent presentments were merely attempts to correct

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[6] *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1922 (4th ed.2000) (defining "virgule" as "[a] diagonal mark (/) used especially to separate alternatives").

this timely presentment. We may not consider an issue raised for the first time on appeal unless it is a purely legal issue and a failure to consider it will result in a miscarriage of justice. *HECI Exploration Co. v. Holloway*, 862 F.2d 513, 518 & n. 7 (5th Cir.1988).

Even assuming the point is not waived, Redcom still had an obligation to correct all deficiencies within the twenty-one-day period unless the letter of credit specifically overrode the UCP.[7] As discussed below, an untimely presentment is an incurable defect, and the bank had no duty to notify Redcom of it. Thus, if the April 24 presentment was untimely, Redcom could make no subsequent presentment that would trigger the bank's payment, and a finding that Redcom failed to make a proper presentment in a timely fashion under the UCP would dispose of the case.

Redcom argues that the parties specifically contracted around the twenty-one-day provision, which says that the bank will honor any proper presentment "on delivery of documents as specified if presented at our counters on or before the expiration date." The bank suggests that this language may be interpreted merely to affirm the period for which the credit was good. "[A] significant showing would have to be made before parties to a letter of credit governed by the UPC would be found

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[7] *Cf. Banco Gen. Runinahui, S.A. v. Citibank Int'l*, 97 F.3d 480, 484 (11th Cir.1996) (rejecting plaintiff's argument that where the letter of credit gave a party fifteen days to present conforming documents, the party had fifteen days to submit some documents, then had until the expiration date to present corrected ones).

to have waived its express terms." *Banco Gen. Runinahui*, 97 F.3d at 486.

The terms of the letter of credit and the actions of the parties suggest that the parties intended to contract around the UPC default rule. The bank notified Redcom after the April 24 and the November 20 presentment that it planned to dishonor it because of the injunction. Even though the bank need not have notified Redcom of the deficiency of untimeliness, it seems surprising that, if the UCP applied, it chose to use the injunction rather than the UCP as the basis for dishonor. Based on its own actions, the bank apparently believed that the letter of credit overrode the UCP's requirements. Therefore, Redcom made a timely presentment.

3.

Even if Redcom had made a timely, deficient presentment, the bank waived its right to raise the discrepancies. The general rule is that "where an issuer formally places dishonor on a specific ground, the issuer is held to have waived all others." *Siderius, Inc. v. Wallace Co.*, 583 S.W.2d 852, 862 (Tex.Civ.App. – Tyler 1979, no writ). Moreover, to retain its ability to raise discrepancies, the bank must prove the existence of an incurable deficiency or that the failure to notify resulted in no prejudice. *See Wing On Bank Ltd. v. Am. Nat'l Bank & Trust Co.*, 457 F.2d 328, 328-29 (5th Cir.1972).

The letter of credit is subject to article 13 of the UCP 500, which requires that banks examine draw documents within seven banking days. If the bank decides to refuse the draw, article 14 requires that it give notice no later

than the close of the seventh day. Article 14(e) establishes that if the bank does not give such notice within the time allotted, it waives its right to claim that the documents are not in compliance.

The bank expressly dishonored Redcom's presentment on account of the injunction on November 25, within the seven-day period. The dishonor, however, did not notify Redcom of any deficiencies in the presentment. Because the bank gave no notice of any other deficiencies, we must address whether the alleged defects were incurable, or whether Redcom suffered no prejudice from the failure.

The bank argues that the defects were incurable, because the document was not timely presented, and that Redcom suffered no prejudice, because the injunction prevented it from honoring the presentment. If the presentment were untimely, no cure would be possible, and the bank had no duty to notify Redcom of the defect. *See Siderius*, 583 S.W.2d at 862. Redcom's presentment was timely, because the letter of credit contracted around the UCP default rules. Thus, Redcom could have cured any defects and would suffer prejudice if the bank failed to notify it.

We address, below, whether the injunction prevented the bank from honoring the presentment. Even if the injunction prevented payment at the time of presentment, it did not excuse the bank from its duty to notify Redcom of discrepancies. Thus, the bank has waived all discrepancies related to the November 20 presentment.

B.

The bank and Redcom dispute whether the injunction prevented the bank from honoring the November 20 presentment. Because the bank waived its right to raise discrepancies, we must assume that the presentment was proper. The bank may still prevail, however, if the injunction prevented it from honoring *any* presentment.[8]

1.

The parties dispute the scope of the temporary injunction, which states that it "is granted *as requested* . . . restraining and enjoining defendant . . . from honoring" the letter of credit (emphasis added). This language seems plainly to mean that the bank cannot honor any presentment for a draw on the letter of credit.

An injunction, however, cannot issue on matters outside the parameter of the request. *Fairfield v. Stonehenge Ass'n Co.*, 678 S.W.2d 608, 611 (Tex.App. – Houston [14th Dist.] 1984, no writ). Counsel for Fiber Wave stated in oral argument before the injunction-issuing court that it requested an injunction only for *improper* presentments:

> Your Honor, we're not here asking that Redcom be enjoined from doing anything. If they can gather the appropriate documentation and

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[8] Redcom believes that the bank specifically should have pleaded an affirmative defense of legal impossibility under Fed.R.Civ.P. 8(c). The bank rightly excoriates this argument as exalting form over substance. The bank's original complaint states that "the Temporary Injunction . . . specifically enjoined the bank from honoring the Letter of Credit," so Redcom's suggestion that the bank has waived this argument is meritless.

> present it to the bank, then the letter of credit should be paid. What we're asking for an injunction and what we got a TRO against was only the bank paying on improper presentment.

Thus, the district court correctly interpreted the injunction as applying only to improper presentments. Because the bank waived its right to challenge the presentment as improper, the injunction did not bar the bank from honoring it.

2.

Nor did the expiration of the letter of credit prevent the bank from honoring the presentment. Although a court order may excuse a party's performance under a contractual obligation,[9] the presence of an injunction, in and of itself, does not excuse performance indefinitely. The injunction "merely suspended [the bank's] obligation to honor or dishonor the drafts during the pendency of the legal restraint," and payment on a proper presentment would come due when the injunction was lifted. *Kelley v. First Westroads Bank,* 840 F.2d 554, 558 (8th Cir.1988).[10]

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[9] *See, e.g., Centex Corp. v. Dalton,* 840 S.W.2d 952, 955-56 (Tex.1992) (concluding that a cease and desist order prevented payment of fees to consultant); *RSB Mfg. Corp. v. Bank of Baroda,* 15 B.R. 650 (S.D.N.Y.1981) (finding that a third party's injunction against a bank issuing a letter of credit prevented it from paying the beneficiary). Redcom correctly distinguishes these cases on the basis that there, the injunction was still in place at the time of judgment.

[10] *See also Engel Indus. v. First Am. Bank, N.A.,* 798 F.Supp. 9, 15 (D.D.C.1992).

This rationale applies even where the letter of credit had expired when the injunction was lifted. *Engel Indus.*, 798 F.Supp. at 15 (citing *Kelley*). In *Kelley*, a TRO froze a timely presentment until the injunction was lifted, then the issuing banks had to process the presentment. *Kelley*, 840 F.2d at 558. Thus, an injunction may provide a defense of impossibility for as long as it stands, but once it is lifted, the bank must honor or properly dishonor the drafts. "[T]he obligation to pay was fixed at the time the documents were presented." *Id.* at 559.

Therefore, because Redcom made a timely presentment, and the bank waived its right to assert deficiencies, the injunction did not excuse the bank's performance permanently. The district court did not err in finding that the bank had wrongfully dishonored the November 20 presentment.

IV.

The bank and Redcom dispute whether Redcom judicially admitted that the injunction excused the bank from paying on the letter of credit. To qualify as a judicial admission, the statement must be (1) made in a judicial proceeding; (2) contrary to a fact essential to the theory of recovery; (3) deliberate, clear, and unequivocal; (4) such that giving it conclusive effect meets with public policy; and (5) about a fact on which a judgment for the opposing party can be based. *See Griffin v. Superior Ins. Co.*, 161 Tex. 195, 338 S.W.2d 415, 419 (1960).

Redcom made statements concerning alternative arguments as to the legal effect of dissolving the injunction. In explaining that the injunction was the but-for

cause of its receipt of payment, it said that unless the court dissolved the order before the letter of credit expired, it would be deprived of payment.

The bank points out the inconsistency in that position and the one it takes here, that the obligation to pay or dishonor vests when the bank receives the presentment. Redcom apparently stated that "[the bank] is restrained from paying the Letter of Credit, thereby causing irreparable harm to Redcom if such restraint will allow the Letter of Credit to expire by its own terms during the pendency of this action." Because the letter of credit did in fact expire before the injunction, the bank believes that Redcom should be held to its admissions.

Even if the bank has correctly characterized Redcom's statements, they do not qualify as judicial admissions. As we observed in *Universal Am. Barge Corp. v. J-Chem.*, 946 F.2d 1131, 1142 (5th Cir.1991), "judicial admissions are not conclusive and binding in a separate case from the one in which the admissions are made." The statements were made in a separate suit to dissolve the injunction, so Redcom is not precluded from raising them here.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HERITAGE BANK f/k/a BRAZOS BANK, N.A., Plaintiff,	§	
	§	**No. 3:99-CV-0801-R**
vs.	§	
REDCOM LABORATORIES, INC. and FIBER WAVE TELECOM, INC.,	§	**(Filed Jun. 28, 2000)**
Defendants.	§	

JUDGMENT

The Court having heretofore entered its Order Adopting the Findings, Conclusions and Recommendation of the United States Magistrate Judge in this case,

It is therefore **ORDERED, ADJUDGED and DECREED** that *Plaintiff's Motion for summary Judgment* is hereby **DENIED** and *Defendant's Motion for Summary Judgment* is hereby **GRANTED**. Furthermore, Judgment is rendered in favor of Defendant Redcom in the amount of $195,729 plus reasonable and necessary attorneys' fees for its claim for wrongful dishonor.

It is further **ORDERED** that the Clerk shall transmit a true copy of this Judgment, together with a true copy of the Order Adopting the Findings, Conclusions, and

Recommendation of the United States Magistrate Judge, to the parties.

Singed this 28 day of June, 2000.

/s/ Jerry Buckmeyer
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HERITAGE BANK f/k/a BRAZOS BANK, N.A.,	§	
Plaintiff,	§	**No. 3:99-CV-0801-R**
vs.	§	**(Filed May 17, 2000)**
REDCOM LABORATORIES, INC. and FIBER WAVE TELECOM, INC.,	§	
Defendants.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. § 636(b) and an Order of this Court, this case has been referred to the undersigned United States Magistrate Judge. Before this Court are the following: *Heritage Bank f/k/a/ Brazos Bank, N.A.'s Motion for Summary Judgment*, filed by Joint Motion Submission on November 10, 1999, and *Defendant Redcom Laboratories, Inc.'s Motion for Summary Judgment*, filed by Joint Submission on November 22, 1999. All parties followed with Responses and Replies thereto. No hearing was necessary on the Motions. Upon due consideration of said motions, the findings, conclusions, and recommendations of the United States Magistrate Judge are as follows:

FINDINGS AND CONCLUSIONS

I. Background

On February 3, 1998, Plaintiff Heritage Bank ("Plaintiff") issued a Commercial Irrevocable Letter of Credit No. 9518 ("Letter of Credit"). *See* Joint App. on Defendant's Motion at 41. Defendant Redcom alleges that a state court injunction insulates it as the issuer of a letter of credit against liability to Defendant Redcom Laboratories, Inc. ("Defendant Redcom") as the beneficiary because the letter of credit expires by its own terms while the injunction was still in effect. *See* Defendant's Motion at 1. For letter of credit purposes, Defendant Fiber Wave is the applicant and Defendant Redcom is the beneficiary. *See* Joint App. for Defendant's Motion at 41. The Letter of Credit expired on February 3, 1999 according to its express terms. *Id.* The goods referenced in the Letter of Credit were shipped to Fiber Wave by Redcom on March 27, 1998. *See* Jt. App. for Defendant's Motion at 10-23, 31-40, and 48-60. Defendant Redcom made a presentment on the Letter of Credit to the bank which was received by the bank on or about May 1, 1998 and included a cover letter dated April 24, 1998. *See* Jt. App. for Defendant's Motion at 47. On May 5, 1998, prior to a final determination by the bank on whether Redcom's presentment complied with the Letter of Credit, Fiber Wave filed a lawsuit in the 249th Judicial District Court of Johnson County, Texas against both Heritage and Redcom. *See* Jt. App. for Defendant's Motion at 24-28. Additionally, Fiber Wave acquired a temporary restraining order ("TRO") to enjoin Heritage from honoring Redcom's presentment. *See id.* On May 6, 1998, Heritage informed Redcom in writing that the presentment was dishonored as a result of the

TRO. *See id.* at 64. The Johnson County Court entered its ruling on June 5, 1998 which enjoined the Bank from honoring the presentment. *See id.* at 67. With the Court's injunction in effect, Redcom attempted to make another presentment to Heritage for payment under the Letter of Credit on November 20, 1998. *See id.* at 3-42. The November 20, 1998 presentment was made prior to the expiration of the Letter of Credit. *See* Jt. App. for Plaintiff's Motion at 7, 9. On November 25, 1998, Heritage, through counsel, expressly informed Redcom that its November 20, 1998 presentment was being dishonored due to the Johnson County Court's order. *See* Jt. App. for Defendant's Motion at 43.

Redcom proceeded to file a Motion to Dissolve the Temporary Injunction with the Johnson County Court on January 27, 1999. *See* Jt. App. for Defendant's Motion at 74. On the same day, Redcom also filed an Application for Injunction whereby Redcom attempted to enjoin the impending expiration of the Letter of Credit which was scheduled to expire on February 3, 1999. *See id.* at 78. The Johnson County Court conducted a hearing on Redcom's Motion and Application on February 1, 1999 and denied both the Motion and Application. *See id.* at 82. The Letter of Credit expired as expressly provided on February 3, 1999. On February 4, 1999, the Johnson County Court granted non-suit to Defendant Fiber Wave. *See id.* at 83. On February 9, 1999, the Johnson County Court entered Orders denying Defendant Redcom's Application and Motion to Dissolve. *See id.* at 85-86. On March 3, 1999, Redcom made demand on the Bank to pay the Letter of Credit and alleges that by Fiber Wave's non-suiting its claims against Heritage, the injunction was dissolved. *See*

Plaintiff's Original Petition for Declaratory Relief at 4, ¶ 12 and Exhibit B.

II. Analysis

A. Standard of Review

Summary judgment is appropriate when the pleadings and the evidence show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Melton v. Teachers Ins. & Annuity Assoc. of Am.*, 114 F.3d 557, 559 (5th Cir. 1997). The applicable substantive law identifies those facts that are material and only disputes about those facts will preclude the granting of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). There is a genuine issue of fact if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Society of Fin. Examiners v. Nat'l Ass'n of Certified Fraud Examiners, Inc.*, 41 F.3d 223, 226 (5th Cir.), *cert. denied*, 515 U.S. 1103 (1995).

The moving party bears the initial burden of showing that there is no genuine issue of fact for trial. *National Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 712 (5th Cir. 1994). Where the nonmoving party bears the burden of proof on a claim upon which summary judgment is sought, the moving party may discharge its summary judgment burden by showing an absence of evidence in support of the nonmoving party's case. *Celotex*, 477 U.S. at 325. Once a properly supported motion for summary judgment is presented, the burden shifts to the nonmoving party to set forth

specific facts showing that there is a genuine issue for trial. *Elliott v. Lynn*, 38 F.3d 188, 190 (5th Cir. 1994), *cert. denied*, 514 U.S. 1117 (1995) (citing *Anderson*, 447 U.S. at 249). All reasonable doubts and inferences must be decided in the light most favorable to the party opposing the motion. *See Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988); *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985). Nonetheless, it takes more than "some metaphysical doubt as to the material facts to satisfy this burden." *Matsusuhita* [sic] *Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmoving party cannot avoid summary judgment with only conclusory allegations or unsubstantiated assertions. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990); *Hopper v. Frank*, 16 F.3d 92, 96-97 (5th Cir. 1994). Summary Judgment will be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

B. Plaintiff Heritage's Motion for Summary Judgment and Defendant Redcom's Motion for Summary Judgment

On November 10, 1999, Plaintiff Heritage Bank f/k/a Brazos Bank ("Plaintiff") filed its *Motion for Summary Judgment* ("Plaintiff's Motion"), Defendant Redcom Laboratories Inc. filed its Response "Redcom's Response") and Plaintiff filed its Reply in a Joint Motion Submission. Plaintiff's Motion requests the Court to grant summary judgment on its claim for declaratory relief that Plaintiff's liability, if any, to Redcom under the Letter of Credit,

expired; that the November 20, 1998 presentment was dishonored by operation of law; and that Plaintiff has no liability under the Letter of Credit. Plaintiff seeks summary judgment on Redcom's counterclaim for wrongful dishonor because the injunction prevented Plaintiff from honoring Redcom's presentments, the second presentment was untimely, and Redcom is collaterally estopped from asserting wrongful dishonor. The Court finds *Plaintiff's Motion for Summary Judgment* should be denied in its entirety.

Defendant filed its *Motion for Summary Judgment*, Plaintiff filed a Response, and Defendant filed a Reply in a Joint Motion Submission on November 2, 1999. Defendant's Motion seeks summary judgment on Plaintiff's claim for declaratory judgment because the expiration of the Letter of Credit did not eliminate the Plaintiff's liability to Defendant Redcom for conforming draws presented prior to the Letter of Credit's expiration, the draw documents presented prior to the expiration were not defective or insufficient, no presentment was dishonored by operation of law, and Plaintiff Bank remains liable to Defendant Redcom under the Letter of Credit. Additionally, Defendant Redcom seeks summary judgment on its counterclaim against Plaintiff for wrongful dishonor. The Court finds *Defendant's Motion for Summary Judgment* on Plaintiff's claim for declaratory relief should be granted and summary judgment on Defendant's claim for wrongful dishonor should be granted.

1. Redcom is not collaterally estopped from demonstrating Plaintiff wrongfully dishonored its presentment, and summary judgment on this issue should be denied.

Plaintiff argues that this Court may not reach Defendant's claim of wrongful dishonor because Defendant is collaterally estopped from raising the claim. The doctrine of collateral estoppal [sic] applies where "(1) the facts sought to be litigated in the first action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action." *Mower v. Bower*, 811 S.W.2d 560, 563 (Tex. 1991); *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990). In addition, the parties in the present action must have also [sic] be either adversaries or in privity in the prior action. *See Daniels v. Equitable Life Insurance Soc. of United States*, 35 F. 3d 210, 214 (5th Cir. 1994) (citing *Eagle Properties*, 807 S.W.2d at 721). Strict mutuality of parties is no longer required. *See Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414, 66 L. Ed. 2d 308 (1980). A Court has broad discretion in deciding whether to apply the doctrine of collateral estoppel. *See Upjohn Co. v. Freeman*, 906 S.W. 2d 92, 101 (Tex. App. – Dallas 1995, no writ). The doctrine of collateral estoppel should not be applied unless application furthers the doctrine's underlying purpose. *See Sysco Food Servs., Inc. v. Trapnell*, 890 S.W. 2d 796, 801-05 (Tex. 1994). The purpose of the doctrine is to "promote judicial efficiency, protect parties from multiple lawsuits, and prevent inconsistent judgments by precluding the relitigation of issues." *See Sysco*, 890 S.W. 2d at 801 (citing, *inter alia, Lytle v. Household Mfg. Inc.*, 494 U.S. 545, 553, 110 S. Ct. 1331, 1337, 108 L. Ed. 2d 504 (1990)).

The facts in the instant case demonstrate that Defendant Fiber Wave filed an application for injunction against Plaintiff Bank to keep the Bank from honoring the letter of credit. The Court ordered a temporary injunction on June 5, 1998 and Plaintiff Bank argues that the June 5 Order collaterally estops Defendant Redcom from a claim for wrongful dishonor because it required a finding that one of the circumstances in Tex. Bus. & Comm. Code § 5.114(b) was present and this was fully and fairly litigated in the Johnson County Court suit. *See* Plaintiff's Motion at 12, 14. Section 5.114(b) provides that an issuer of a letter of credit may rightfully dishonor a presentment when, "a required document does not in fact conform to the warranties made on negotiation or transfer of a document of title (Section 7.507) or of a certificated security (Section 8.108) or is forged or fraudulent or there is fraud in the transaction." *See Paris Savings & Loan Ass'n v. Walden*, 730 S.W.2d 355, 358 (Tex. App. – Dallas 1987, writ dism'd); *see also AIG Risk Management, Inc. v. Motel 6 Operating L.P.*, 960 S.W. 2d 301, 305 (Tex. App. – Corpus Cristi [sic] 1997, no writ). In Texas, however, a party is not bound by a temporary injunction unless the opposing party appeals the injunction. *See Brooks v. Jones*, 578 S.W. 2d 669, 673 (Tex. 1979). Defendant Redcom did not appeal the June 5 Order, thus, Defendant Redcom is not collaterally estopped from raising the wrongful dishonor issue simply by the Court's June 5 Order issuing the temporary injunction.

Additionally, Plaintiff argues the Johnson County Court's denial of Defendant Redcom's Motion to Dissolve the Temporary Injunction is a conclusive adjudication of

the issues so as to support collateral estoppel. *See* Plaintiff's Motion at 14. Plaintiff further asserts that the fact that Defendant Redcom appealed the Johnson County Court's Order denying Redcom's Motion to Dissolve, supports collateral estopel. The Texas Supreme Court in *Brooks* ruled that where the losing party initially appeals and then drops its appeal, the injunction is not considered a final judgment. 578 S.W. 2d at 673. In the instant case, although Defendant Redcom filed an appeal of the Johnson County Court's denial of its Motion to Dissolve, it withdrew the appeal and the Waco Court of Appeals dismissed the Appeal at Defendant's request. *See* Plaintiff's Motion App. at 34. The Johnson County Court never issued a permanent injunction. The injunction was in effect to prevent honor of the letter of credit but the intent was not to permanently place the letter of credit on hold. *See* Plaintiff's Motion App. at 16-18; *see also* June 4, 1998 Trial Transcript Excerpt, Defendant's Motion Jt. App. at 3. Plaintiff's attempt to argue that even though there was no appeal of denial of Defendant Redcom's Motion, a final judgment is a judicial decision on a "question of fact or law which is not provisional and subject to change in the future by the same tribunal" and that a final judgment was made here because the Court failed to grant any relief prior to expiration of the letter of credit is unpersuasive in the instant case. *See* Plaintiff's Reply at 11 (citing *Wilson v. Abilene Indep. Sch. Dist.*, 204 S.W.2d 407, 410 (Tex. Civ. App. – Eastland 1947, writ ref'd, n.r.e.); *Brooks*, 578 S.W. 2d at 672-73)). The injunction was *temporary* and could have been removed at any time by the Court or upon the insistence of Fiber Wave. In fact, it was removed after Fiber Wave non-suited the action. The

Court simply replied that it would not dissolve the injunction at Defendant Redcom's request. As this Court further explores below, expiration of the letter of credit and dissolution of the temporary injunction subsequent to expiration did not statutorily dishonor any proper presentments. It was never a final judgment and therefore Defendant is not estopped from raising its claim for wrongful dishonor as a matter of law. There are no material facts in dispute as to this issue and summary judgment is denied.

2. Bank Has Not Waived its right to Raise the Discrepancies Found in the April 24 Draw; however, Bank has waived its right to raise discrepancies in the November 20 Draw.

Defendant claims summary judgment should be granted because Plaintiff waived discrepancies in the April 24, 1998 draw by failing to notify Defendant of deficiencies as required by law under Rule 14 of the Uniform Customs and Practice for Documentary Credits ("UCP"). Rule 14 requires the Bank to notify Defendant of deficiencies in the presentment within seven banking days after receipt of the presentments. UCP, 1993 Revision, ICC Pub. No. 500. Where a deficiency is incurable or where the failure to notify resulted in no prejudice, the Bank has not waived the deficiencies. *See Wing On Bank Ltd. of Hong Kong v. American National B. & T. Co.*, 457 F.2d 328, 328-29 (5th Cir. 1972); *see also Breathless Assoc. v. First Savings & Loan Ass'n*, 654 F. Supp. 832, 838-39 (N.D. Tex. 1986); *see also Siderius, Inc. v. Wallace Co., Inc.*, 583 S.W. 2d 852, 862 (Tex. Cir. App. – Tyler 1979, no writ). Defendant Redcom has admitted the April 24, 1998 presentment did

not strictly comply with the terms of the Letter of Credit. *See* Redcom's Motion to Dissolve at 2, Defendant Redcom's Motion App. at 75. Therefore, the Court finds that Plaintiff's failure to notify Defendant of deficiencies in the April 24 presentment has resulted in no prejudice to Defendant Redcom. Thus, as a matter of law, Plaintiff has not waived the deficiencies in the April 24 presentment.

Plaintiff also argues the November 20 presentment did not strictly comply with the terms of the Letter of Credit and thus the Bank did not waive its right to raise deficiencies. The facts are different, however, regarding the November 20 presentment. Plaintiff alleges it was not required to notify Defendant of any deficiencies because it was prevented from honoring them by the Temporary Injunction. Plaintiff contends that the Temporary Injunction required dishonor and would have caused Plaintiff to dishonor the presentment even if all presentments strictly complied with the terms of the Letter of Credit. Thus, Plaintiff argues Defendant suffered no prejudice. As stated by this Court below, the Temporary Injunction did not statutorily dishonor or allow a rightful dishonor by Bank of all presentments simply because there was an injunction in place. Therefore, the Court rejects this argument and instead turns to whether or not the deficiencies in the November 20, 1998 presentment were incurable and whether Defendant was prejudiced by Plaintiff's failure to notify Defendant of the deficiencies. The difference between the April 24 and November 20 presentments hinges on the fact that Defendant Redcom presented the necessary documentation with the November 20 presentment. Article 21 of the UCP 500 provides:

> When documents . . . are called for, the Credit should stipulate by whom such documents are to be issued and their wording or data content. If the Credit does not stipulate, banks will accept such documents as presented, provided that their data content is not inconsistent with any other stipulated document presented.

Defendant Redcom has Federal Express receipts and sworn statements in pleadings filed by Fiber Wave which state that the equipment at issue in the Letter of Credit was delivered. *See* Defendant's Motion App. at 21-28; 41. Neither party presents this Court with evidence of any agreed to stipulation in reference to notification other than what is provided for in Article 21. As no other data content or stipulated document was specified or presented by the parties, the Court finds the Federal Express and Fiber Wave's sworn statement sufficient to meet the general standard of Article 21. Both sets of documents clearly show to whom they were issued. Therefore, summary judgment should be denied Defendant Redcom regarding Plaintiff's waiver of deficiencies in the April 24 presentment; however, summary judgment should be granted as a matter of law on the November 20 presentment. The November 20 presentment strictly complied with Article 21. Therefore, summary judgment should be granted Defendant, and Plaintiff has waived all discrepancies in the November 20 presentment as a matter of law.

3. The Court finds the Letter of Credit expired on February 3, 1999, and any demands on the Letter of Credit made thereafter are ineffective

Plaintiff argues as an initial matter that the letter of credit expired as a matter of law on February 3, 1999 and any demands made thereafter on the Letter of Credit are void. An issuer's liability on a letter of credit is contingent on the beneficiary's proper presentment. *See Westwind Exploration Inc. v. Homestate Savings Ass'n*, 696 S.W. 2d 378, 381 (Tex. 1985). A beneficiary's strict compliance with the terms of a letter of credit is a question of law which falls to the Court for decision. *See Westwind*, 696 S.W. 2d at 381. An expiration date is a term of the letter of credit which requires compliance. If upon demand or presentment the expiration date has expired, the demand or presentment is null and void. *See Cypress Bank v. Southwestern Bell Telephone Co.*, 610 S.W. 2d 185, 187 (Tex. App. – Houston [1st Dist.] 1980, writ ref'd n.r.e.); *see also Siderius Inc. v. Wallace Co. Inc.*, 583 S.W. 2d 852, 860 (Tex. Civ. App. – Tyler 1979, no writ). Defendant stipulates that any presentment, including the one on February 3, 1999, made subsequent to the expiration date of the letter of credit is null and void. The Court finds that as a matter of law the letter of credit expired on February 3, 1999, and therefore, any presentments made subsequent to the date are null and void.

4. Redcom's Attempted November 20 Presentment Was Not Properly Dishonored and Summary Judgment on Behalf of Plaintiff should be denied.

Plaintiff asserts it was enjoined from honoring any presentment on the Letter of Credit after the Johnson County Court entered its Order granting Fiber Wave's application for a temporary injunction to restrict the Bank from any action on the Letter of Credit. Defendant Redcom counters that the injunction did not permit Plaintiff to *dishonor* a presentment made on the Letter of Credit. Instead, Defendant argues that the June 5 Order enjoined the Bank from "honoring" the April 24 Draw during the pendency of the injunction. *See* Defendant Redcom's Response at 5. Defendant cites *Kelley v. First Westroads Bank*, as authority on the issue, 840 F.2d 554 (8th Cir. 1987). Plaintiff replies by distinguishing the facts in *Kelley* from those in the instant case. Plaintiff argues that unlike *Kelley* the temporary injunction in this case expired subsequent to the expiration of the Letter of Credit. Moreover, Plaintiff asserts that Defendant made certain judicial admissions in the Johnson County Court suit which reveal its own acknowledgment that unless the temporary injunction was dissolved prior to the Letter of Credit's expiration, Defendant would have no remedy. *See* Plaintiff's Reply at 4-5; Defendant's Motion to Dissolve Temporary Injunction and Application for Injunction, Jt. App. to Plaintiff's Motion at 19-27.

To establish a claim for wrongful dishonor, Defendant must show there was (1) an issuance of the letter of credit, (2) timely presentation of necessary documents; and (3) failure to pay on the letter of credit. *See Voest-*

Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 892 (5th Cir. 1998). The Letter of Credit in this case was issued on February 3, 1998, a presentment was made prior to the expiration of the letter of credit and the Bank failed to pay on the letter of credit after the temporary injunction was lifted. Therefore, a claim has been established because there has been an issuance, timely presentation, and a failure to pay. *See* Plaintiff's Motion at 2 & 5.

Defendant Fiber Wave, the account party on the Letter of Credit, filed an application for a temporary injunction on Plaintiff Bank from honoring the Letter of Credit and the Court ordered a temporary injunction on June 5, 1998. *See* June 5, 1998 Order, Plaintiff's Motion Jt. App. at Exhibit B-2. At the June 4, 1998 hearing held before the Honorable C. C. (Kit) Cooke, Fiber Wave's counsel argued, "Your Honor, we're not here asking that Redcom be enjoined from doing anything. If they can gather the appropriate documentation and present it to the bank then the letter of credit should be paid. What we're asking for an injunction and what we got a TRO against was only the bank paying on improper presentment." *See* June 4, 1998 Trial Transcript Excerpt, Defendant's Motion Jt. App. at 3. Fiber Wave requested the Court's Order granting the temporary injunction be directed at any improper presentments made by Defendant Redcom to Plaintiff Bank. An improper presentment was made on May 1, 1998. That presentment under the temporarily injunction should have been dishonored and was dishonored by Plaintiff. Now, the question becomes, Was Plaintiff enjoined from honoring *any* presentment and if not, was the November 20, 1998 presentment properly dishonored? The Court finds the excerpt of the trial on June 4,

1998 instructive. Fiber Wave in its arguments to the Court did not seek an injunction in order to enjoin the Bank from honoring *any* presentments but instead it sought to enjoin the Bank from honoring *improper* presentments. *See id.* Thus, once the injunction was removed, the Bank still had a legal obligation to pay on any proper presentment made prior to the expiration of the letter of credit.

The Eighth Circuit decided in *Kelley* that, in effect, when a temporary injunction is imposed on a bank from honoring a letter of credit, it merely preserves the letter of credit's status quo. *See Kelley*, 840 F.2d at 558; *see also Engel Industries, Inc. v. First American Bank*, 798 F. Supp. 9, 15 (D.C. 1992) (stating the temporary restraining order was viewed in *Kelley* as holding payment in suspension, like a freeze); *see also* Albert J. Givray, *Survey: Uniform Commercial Code, Letters of Credit*, 44 BUS. LAWYER 1567, 1613-16 (1989) (advising beneficiaries that as long as the injunction subsists, the issuer should retain the presented documents for possible future processing towards issuer's honor-dishonor decision, processing will not resume until the injunction terminates and the issuer will return the presented documents to the beneficiary when so requested and issuer will take no action inconsistent with the injunctions terms unless otherwise direct by the court). In other words, the letter of credit is frozen until such time as the injunction is removed. The Court in *Kelley* rejected the Bank's argument that a temporary injunction causes a "statutory dishonor." Plaintiff in the instant case attempts to make the same argument as the Bank in *Kelley*. This Court finds no genuine issues of material fact exist as to this issue, and the temporary injunction does not constitute a statutory dishonor of a

presentment as a matter of law. Plaintiff Bank was instead legally bound to follow its legal obligations written into the letter of credit to properly honor or dishonor any presentment upon dissolution of the temporary injunction.

When the temporary restraining order expired, the issuing bank was under an obligation to process the letter of credit. It had the option, of course, to honor the drafts or to reject them. However, failure to honor or *properly* dishonor the drafts during the pertinent period constitutes a wrongful dishonor. *See Kelley*, 840 F.3d at 558-59. Due to the fact that the Bank was enjoined from honoring the letter of credit, it should have properly dishonored any improper presentment made on the letter of credit and hold payment on any proper presentments made until expiration of the temporary injunction. It should not make any difference that the letter of credit expired prior to the expiration of the temporary injunction. If proper presentments were made prior to expiration of the letter of credit, then after the temporary injunction was removed, the Bank should have paid on the Draw.[1] No genuine issue of material fact exists as to this issue. The Court finds the November 20, 1998 presentment was wrongfully dishonored as a matter of law, and summary judgment is denied Plaintiff and granted Defendant regarding this issue.

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[1] The Court distinguishes between a proper presentment and an improper presentment. The law is clear that payment should follow a proper presentment which occurs when the Bank finds the presentment in strict compliance with the terms of the letter of credit. *See Westwind*, 696 S.W. 2d at 380-81; *see also Breathless*, 654 F. Supp. at 835-36.

RECOMMENDATIONS

Based on the foregoing conclusions, this Court recommends *Plaintiff's Motion for Summary Judgment* should be **DENIED**, and *Defendant's Motion for Summary Judgment* should be **GRANTED**. This Court is of the opinion that no questions of fact exist and that Plaintiff should take nothing by way of this action. Defendant should recover as a matter of law under its claim against Plaintiff for wrongful dishonor. Judgment should be rendered in favor of Defendant Redcom on its claim for wrongful dishonor in the amount of $195,729 plus reasonable and necessary attorneys' fees and costs. Judgment should be rendered against Plaintiff Bank on all declaratory relief sought.

SIGNED this 17 day of May, 2000.

/s/ Paul D. Stickney
PAUL D. STICKNEY
United States Magistrate
Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10835

HERITAGE BANK, formerly known as Brazos Bank NA
Plaintiff-Counter Defendant-Appellant

v.

REDCOM LABORATORIES INC; ET AL
Defendants

REDCOM LABORATORIES INC
Defendant-Counter Claimant-Appellee

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING

(Filed June 13, 2001)

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/S/ [Illegible]
United States Circuit Judge

APPENDIX B

UNITED STATES CODE ANNOTATED CONSTITUTION AMENDMENTS

AMENDMENT X – RESERVED POWERS TO STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

TEXAS CIVIL PRACTICE AND REMEDIES CODE

§ 51.014(5) Appeal From Interlocutory Order

A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

(5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;

TEXAS GOVERNMENT CODE

§ 22.003 Procedure of the Court

(a) The supreme court from time to time shall promulgate suitable rules, forms, and regulations for carrying into effect the provisions of this chapter relating to the jurisdiction and practice of the supreme court.

(b) The supreme court may make and enforce all necessary rules of practice and procedure, not inconsistent with the law, for the government of the supreme court and all other courts of the state to expedite the dispatch of business in those courts.

TEXAS GOVERNMENT CODE

§ 22.004 Rules of Civil Procedure

(a) The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.

(b) The supreme court from time to time may promulgate a specific rule or rules of civil procedure, or an amendment or amendments to a specific rule or rules, to be effective at the time the supreme court

deems expedient in the interest of a proper administration of justice. The rules and amendments to rules remain in effect unless and until disapproved by the legislature. The clerk of the supreme court shall file with the secretary of state the rules or amendments to rules promulgated by the supreme court under this subsection and shall mail a copy of those rules or amendments to rules to each registered member of the State Bar of Texas not later than the 60th day before the date on which they become effective. The secretary of state shall report the rules or amendments to rules to the next regular session of the legislature by mailing a copy of the rules or amendments to rules to each elected member of the legislature on or before December 1 immediately preceding the session.

(c) So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that in the court's judgment is

repealed. The list has the same weight and effect as a decision of the court.

(d) The rules of practice and procedure in civil actions shall be published in the official reports of the supreme court. The supreme court may adopt the method it deems expedient for the printing and distribution of the rules.

(e) This section does not affect the repeal of statutes repealed by Chapter 25, page 201, General Laws. Acts of the 46th Legislature, Regular Session, 1939, on September 1, 1941.

TEXAS GOVERNMENT

§ 22.225(b)(5) Effect of Judgment in Civil Cases

(a) Except as provided by Subsection (c), a judgment of a court of appeals is conclusive on the law and facts, and a writ of error is not allowed from the supreme court, in the following civil cases:

(5) an appeal from an order or judgment in a suit in which a temporary injunction has been granted or refused or

when a motion to dissolve has been granted or overruled;

TEXAS RULES OF COURT – STATE

RULE 26.1.b. TIME TO PERFECT APPEAL

26.1 Civil Cases. The notice of appeal must be filed within 30 days after the judgment is signed, except as follows:

(b) in an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed.

TEXAS RULES OF COURT – STATE

RULE 28.1 ACCELERATED APPEALS IN CIVIL CASES

28.1 Interlocutory Orders. An appeal from an interlocutory order, when allowed, will be accelerated. Filing a motion for new trial will not exceed the time to perfect the appeal. The trial court need not, but may – within 30 days after the order is signed – file findings of fact and conclusions of law.

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(2)
Supreme Court, U.S.
FILED
01 486 SEP 17 2001

No. _____

In The

Supreme Court of the United States

HERITAGE BANK, f/k/a BRAZOS BANK NA,

Petitioner,

v.

REDCOM LABORATORIES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HERITAGE BANK f/k/a BRAZOS BANK, N.A., Plaintiff,	§	
vs.	§	No. 3:99-CV-0801-R
REDCOM LABORATORIES, INC. and FIBER WAVE TELECOM, INC., Defendants.	§	

ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed June 28, 2000)

After making an independent review of the pleadings, files and records in this case, and the findings, conclusions, and recommendation of the United States Magistrate Judge, I am of the opinion that the findings and conclusions of the Magistrate Judge are correct and they are adopted as the findings and conclusions of the Court.

Signed this 28 day of June, 2000.

/s/ Jerry Buchmeyer
UNITED STATES
DISTRICT JUDGE

TEXAS CIVIL PRACTICE AND REMEDIES CODE

§51.014(4) Appeal From Interlocutory Order

A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

(4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;